



# Commonwealth of Massachusetts State Ethics Commission

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## CONFLICT OF INTEREST OPINION EC-COI-93-5\*

### FACTS:

You are a full-time Agent (Agent) in the Investigative Unit of the Division of Registration. In addition, you are a registered pharmacist. You are assigned matters involving individuals and facilities regulated by the Pharmacy Board of Registration (Board). As an Agent, you initiate and receive complaints concerning registered pharmacists in addition to nurses, dentists, nurse practitioners, respiratory therapists and veterinarians. You also conduct inspections of controlled premises, including retail pharmacies, chain pharmacies, institutional pharmacies, clinics and wholesale pharmacies. You sometimes coordinate investigations in conjunction with the Massachusetts State Police and the federal Drug Enforcement Agency.

Regulations promulgated by the Board provide standards of conduct as well as various procedures concerning records keeping and the filling of prescriptions by pharmacists. 247 CMR 3.00 et seq. Pharmacies are subject to inspection on a regular basis to assure compliance with these regulations. Specifically, with regard to records keeping detailing the refilling of prescriptions, state inspectors confirm only the existence of daily logs as required by Massachusetts regulation. Any examination of the content of the logs would occur on the federal level in the nature of a Drug Enforcement Agency audit. Additionally, records or other data required to be submitted to other state agencies such as the Department of Public Welfare (for Medicaid billing purposes) or to the Department of Public Health (for monitoring the prescription writing habits of physicians or other practitioners) would not be the responsibility of the dispensing physician, but rather would be handled by the pharmacy owner or other administrators.

You are contemplating working on a part-time basis for a pharmacy which is subject to regulation by the Board. You would not, however, be the "principal" registered pharmacist for the pharmacy. As a part-time dispensing pharmacist, it is therefore unlikely that you would have dealings with the Board or any other agency of the Commonwealth.

### QUESTION:

May you be employed as a registered pharmacist outside of your normal state working hours in a pharmacy regulated by the Board?

### ANSWER:

Yes, subject to the limitations set forth below.

### DISCUSSION:

As a full-time Agent of the Division, you are a state employee for purposes of the conflict of interest law. G.L. c. 268A, §1(q).

#### Section 4

Section 4(a) prohibits a state employee from receiving compensation from anyone other than the Commonwealth in relation to a particular matter<sup>1/</sup> in which the Commonwealth or one of its agencies is a party or has a direct and substantial interest.

Although pharmacies are owned by private entities, the operation of a retail pharmacy is nevertheless regulated by the Board. G.L. c. 112, §37. By statute, a retail drug business must obtain a permit or license to operate from the Board. The Commonwealth therefore has a direct and substantial interest in the application for and issuance of an operation permit, a “particular matter” under the conflict of interest law. G.L. c.268A, §1(k). The issue, therefore, is whether the compensation you receive as a part-time pharmacist would be “in relation to” the permit or license to operate.

In *EC-COI-87-31*, n.7, the Commission first recognized that certain work done pursuant to a permit may not be considered “in relation to” that permit for purposes of applying the conflict of interest law. The Commission in that case stated:

For example, a municipal employee, who is one of many privately paid employees or independent contractors on a major construction project, and who has no responsibility for dealing with the town on any matter, might not be considered to be privately compensated “in relation to” the permit which allows the construction.

More recently in *EC-COI-92-1* the Commission again noted that “not all work pursuant to such permits [city building permits] is ‘in relation to’ the permit.” *See also EC-COI-92-40*.

The Commission has previously distinguished between cases where a public employee would be part of a privately paid crew and those instances where the public employee is doing all of the work pursuant to a permit himself. Where the public employee is presumably the person who will have to interact with public officials, the Commission has been more likely to find that the privately paid for work is in connection with the permit, i.e. the particular matter in which a public agency will have a direct and substantial interest. *See EC-COI-88-9* (carpentry work would be completed by public employee himself rather than by him as part of a crew, therefore work would be done pursuant to the building permit).

In addition, in *EC-COI-90-13* we recognized that where an agency exercises substantial regulatory authority and oversight of an activity, the Commonwealth may have a direct and substantial interest in the activity. However, regulatory authority and oversight of an activity alone are not sufficient to find a particular matter in which the Commonwealth has a direct and substantial interest. Rather we must determine whether the regulated activity itself involves a “particular matter” (as defined by the conflict of interest law) in which the employee is likely to become involved<sup>2</sup> — such as the submission of reports for approval; a submission to a state agency is a particular matter in which the Commonwealth has a direct and substantial interest. The Commission has previously held that regulations, in and of themselves, are not particular matters. *EC-COI-81-34*.

Applying this precedent to your circumstances, we find that the compensation you will receive in your contemplated private employment is not “in relation to” the permit to engage in the retail sale of drugs. We so conclude because you will serve as one of several registered pharmacists employed by the private pharmacy, and you yourself are unlikely to have responsibility for dealing with the Board or another state agency on any matters concerning the retail sale of drugs. The compensation for your services would not therefore be in relation to the pharmacy’s operating permit. We note nevertheless, that should you discover that you are required to deal with state agencies as a part-time pharmacist, the §4 restriction will prohibit your proposed employment.

Additionally, while we recognize that the Board’s regulations require various procedures for the dispensing of drugs and related records keeping, this does not, without more, result in our finding that the compensation of an individual pharmacist is “in relation to” a particular matter in which the Commonwealth has a direct and substantial interest. Because regulations are not in and of themselves particular matters, regulatory compliance alone will not raise an issue under §4(a). *See EC-COI-87-34* (under §5, former state employee could receive private compensation in case involving interpretation or application of regulation in which he had previously participated in drafting as a state employee; absent a challenge to the validity of the regulation, private compensation not “in connection with” the promulgation of the regulation); *81-162*; *81-34*.

We might, however, find that certain of your required tasks as a registered pharmacist involve particular matters in which the Commonwealth has a direct and substantial interest were you, yourself responsible for reporting information or otherwise making submissions to the state. Again, should you find yourself responsible

for making such submissions to the state, §4 will prohibit your proposed employment.

In summary, we conclude that your activities as a privately compensated registered pharmacist will not be in connection to the private pharmacy's operating permit if you will not be serving as the principal pharmacist and will not have dealings directly with the Board or any other agency of the Commonwealth. In addition, your proposed activities as a part-time (assistant) pharmacist, although prescribed by regulation, would not themselves involve particular matters in which the Commonwealth or one of its agencies has a direct and substantial interest. Under these circumstances, your proposed private compensation will not therefore violate §4(a).<sup>3/</sup>

## **Section 6**

Section 6 provides that a state employee may not participate as such in any particular matter in which, among others, his private employer, or any person with whom he is negotiating or has any arrangement for prospective employment has a financial interest. If a state employee's duties would normally require him to participate in such a matter, he must in writing advise his appointing authority and the Ethics Commission of the nature and circumstances of the particular matter and the financial interests involved. The appointing authority must thereafter assign the matter to another employee, assume responsibility for the matter himself or make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Commonwealth may expect from the employee. A copy of such a determination must be filed with the Ethics Commission.

The Commission has previously held that a pharmacy has a financial interest in Board inspections and investigations of pharmacies with which it is in geographic competition. *EC-COI-82-95*. Therefore, the §6 restrictions will apply to you with regard to inspections or investigations of the pharmacy by which you are privately employed or of any of the geographic competitors of that pharmacy. Therefore, before inspecting or investigating your pharmacy or any such competitive pharmacy, you must disclose the financial interest of your private employer in that matter to your appointing authority and the Ethics Commission and then your appointing authority must comply with the requirements of §6. Your appointing authority should determine which retail pharmacies are the geographic competitors of the pharmacy by which you seek to be employed. *See EC-COI-86-13*.

## **Section 23**

Section 23 imposes standards of conduct applicable to all public employees. Specifically, §23(b)(2) prohibits a state employee from using or attempting to use his official position to secure unwarranted privileges or exemptions for himself or for others.

In applying §23 to your facts, you may not use your state position to secure any unwarranted privileges for yourself or for others. For example, you could not use your relationship with other agents to seek to influence the outcome of an inspection or investigation of the pharmacy by which you are employed. In addition, pursuant to §23(c) you may not disclose any confidential information to which you may have access as a state employee. Confidential information is information which is not available to the public in a "public record" as defined by G.L. c. 4, §7(26).<sup>4/</sup>

**DATE AUTHORIZED:** January 26, 1993

\*Pursuant to G.L. c. 268B, §3(g), the requesting person has consented to the publication of this opinion with identifying information.

<sup>1/</sup>"Particular matter," any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property. G.L. c. 268A, §1(k).

<sup>2/</sup>We recognize that a literal reading of §4(a) provides a prohibition against receiving compensation "in relation to," rather than compensation which is "likely" to be in relation to a particular matter in which the Commonwealth has a direct and substantial interest. We nevertheless are satisfied that in interpreting and applying the "in relation to" statutory requirement, it is appropriate to examine whether a state employee, in his private employment, is "likely" to have dealings with a state regulator or agency in a particular matter

on behalf of a private party. The underlying principle behind §4 is that “public officials, should not in general be permitted to step out of their official roles to assist private entities or person in their dealings with government.” Buss, *The Massachusetts Conflict of Interest Statute: An Analysis*, 45 B.U.L.Rev. 322, n.135 (1965) citing Perkins, *The New Federal Conflict of Interest Law*, 76 Harv.L.Rev. 1120 (1963). In seeking to effectuate this statutory purpose, we find it useful to determine the likelihood that a public employee will be placed in a position where the employee will have an opportunity to have dealings with government officials on behalf of a private party. Where we find such a likelihood, we will apply the restrictions of §4.

<sup>3</sup>We note that §4(c) prohibits you from acting as agent for anyone other than the Commonwealth in connection with a particular matter in which the Commonwealth or one of its agencies is a party or has a direct and substantial interest. It appears unlikely, however, in light of the duties of a part-time pharmacist and the §4(a) restriction, that you will have any contact with a state agency as agent for the pharmacy by which you will be employed. Moreover, submissions made by the pharmacy to the Department of Public Welfare and the Department of Public Health do not contain the names of the dispensing pharmacists among the data required to be reported. We caution you, however, that you may not act as agent for the pharmacy before any non-state entity as well (such as at a press conference or before a federal agency) in connection with matters in which the Commonwealth is a party or has a direct and substantial interest.

<sup>4</sup>Section 23(e) provides that the head of a state agency may establish and enforce additional standards of conduct. You should therefore consult with your agency before beginning your proposed private employment to ascertain whether the agency has adopted any such additional standards.